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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 275

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LAWRENCE DYER,

*Appellant,*

*vs.*

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN ET AL.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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## STATEMENT OPPOSING JURISDICTION

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J. ARTHUR MORAN,
EARL J. CASKEY,
*Counsel for Appellees.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 275

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LAWRENCE DYER,

*Appellant,*

*vs.*

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, AS CITY MANAGER OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN, R. H. CALLAND, AS CITY CLERK OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; AND STANLEY J. GOLDSCHMIDT, CITY SANITARIAN OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN,

*Appellees*

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## STATEMENT OPPOSING JURISDICTION

### I

### Nature of Case

The Beloit, Wisconsin, milk ordinance, which is under attack by the petitioner in this case, regulates the distribution and sale of whole milk for direct human consumption in the City of Beloit (R.17). It does not regulate the production of milk produced on farms for use outside the City of Beloit. At the time of the trial, between one hundred six

and one hundred eleven farms were producing Grade A milk for consumption in the city, while three hundred nineteen farms in the same area were producing Grade B milk for sale and consumption elsewhere (R.15). Under Sections 97.31-97.37, Wisconsin Statutes, the Wisconsin Department of Agriculture leaves to the City of Beloit the responsibility of protecting the purity of Grade A milk, but assumes the responsibility for the enforcement of regulatory provisions pertaining to Grade B milk. The city, therefore, exercises regulatory control over approximately one-fourth of the milk produced in the area prescribed by its ordinance. The state exercises regulatory control over the balance. Approximately three-fourths of the milk produced in the area prescribed by the ordinance is, therefore, not subject to it. The ordinance provides health precautions and sanitary regulations, as well as inspection of the pasteurization plants, and also for periodical inspection of all farms supplying such plants (R.27). No attack is made upon any provision of the ordinance, except Sec. 8.09 (X) (2), which provides:

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the city of Beloit."

The state line of Wisconsin and Illinois is the south city limits of the City of Beloit, Wisconsin. The area described in the ordinance extends almost six miles into Illinois. Milk produced on farms and pasteurized in plants in Illinois and within the area prescribed by the ordinance may be, and is, furnished to the City of Beloit for direct consumption (R.76). The villages of Rockton and Roscoe, Illinois, are within the area.

The petitioner stated in his application for a license and on the trial that he intended to distribute milk in his

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truck to retail merchants in the City of Beloit for consumption therein, purchasing such milk from a pasteurization plant at Chemung, Illinois,—a distance of between twenty-five and thirty miles from the City of Beloit (R. 12). It was stipulated in court that one hundred ninety-seven farms located in Illinois and Wisconsin supply milk to this Chemung plant (R.12). The granting of a license to the petitioner would, therefore, have added a pasteurization plant and almost two hundred farms to the number to be inspected by the two sanitarians employed by the City of Beloit. It was proven at the trial that these additional duties would entail the employment of an additional inspector, at a cost of at least $2,400.00 per annum (R.17).

After the denial of a license, solely because the pasteurization plant from which the petitioner was to bring milk for direct consumption in Beloit was outside the prescribed limits of Section 8.09 (X) (2) of the Ordinance, petitioner brought mandamus in the Circuit Court for Rock County, Wisconsin, to compel the city to issue him a license. The Circuit Court dismissed his petition for mandamus. Upon appeal, the Supreme Court of Wisconsin, on June 9, 1947, entered judgment affirming the decision of the lower court. It is conceded that the federal questions now raised in this case were raised and urged throughout all the proceedings in the state courts.

## II

### Question Involved Is Unsubstantial

It is denied that the Supreme Court of Wisconsin held in this case that the production and sale of any wholesome food may be arbitrarily restricted to that produced and processed in specified territories surrounding a city to an amount deemed capable of supplying its population.

The Trial Court, in its opinion, expressly repudiated any such doctrine in the following language:

> "Zoning ordinances are valid if reasonable and not intended as a trade barrier. They must also be reasonable and not arbitrary, capricious or discriminating. I am aware that the mere fact that a City already has a sufficient number of milk dealers, or has an adequate supply of milk, would present no valid reason for the refusal of a license to sell milk in the City, as that would then be an unfair and illegal interference with property and constitutional rights."

The following excerpts from the opinion of the Supreme Court of Wisconsin in this case repudiate any implication that the Court held that a city may impose trade barriers upon the production and processing of milk:

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption."
>
> "The reasonableness of an ordinance depends upon the purpose sought to be accomplished and the effect upon all who must comply with it."
>
> "The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three-fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is

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ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to nearby plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk."

"Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance."

"Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

The facts in this case equally repudiate the assertion in petitioner's brief that the intent or effect of the ordinance is to create a trade barrier. The City of Beloit is in the center of a large milk-producing area. It produces three times as much milk as the inhabitants consume. A large number of milk plants located in this area surround the City of Beloit. There is enough business to justify additional plants, as the Supreme Court of Wisconsin observed

in its opinion. While the ordinance does not provide that the farms supplying pasteurization plants be within the six-mile zone, all farms supplying the plants furnishing milk to the city are within the zone, because farmers, as a matter of convenience and economy, usually haul their milk to the nearest plant, and they have a wide choice in this respect (R. 40). Had the City Council of Beloit intended to limit the pasteurization plants to a number sufficient merely to supply the demands of its citizens, it would have circumscribed a line much closer to the city. It would not have drawn about the city a circle whose diameter is twelve miles. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance, in the light of these conditions, creates a prima facie presumption that it is reasonable. 3 McQuillan, Mun. Corp. (2d ed.) P. 110. In view of the foregoing facts, the ordinance cannot be said to be arbitrary, capricious or unreasonable. It designates an area which is not detrimental to the business interests of any existing or proposed pasteurization plant. Petitioner has not attempted to prove, and the record is devoid of any proof, that any such plant, no matter where located, has lost its Beloit market as a result of the ordinance, or that any such plant, outside the area, has sought to enter the City of Beloit market since its passage. It is evident that the city, in prescribing a restrictive area, worked no injustice to the interests of any existing pasteurization plant, or of any plant that might be operated in the foreseeable future. At the same time, acting under its police powers, it insured to its citizens an effective protection of their health by efficient inspection of both plants and farms.

It cannot be soundly argued that the ordinance creates a trade barrier because the petitioner cannot comply with it. If he is permitted to purchase and deliver milk into

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the City for sale for human consumption, a distance of twenty-five to thirty miles, then others will have the right to haul from greater distances and from different directions—and, incidentally, from localities where there may be no local inspection at all, although this last point is of no importance, as the City of Beloit is under no compunction to rely upon other cities to solve its local problems. Under these conditions, there would no doubt be a partial, if not a total, breakdown in the inspection service of the city. The selfish business interests of a lone operator are not to be compared to the health of an entire community.

We find no case adjudicated by a court of last resort which is in point on the facts. Each case must be judged upon its own merits. The case of *Sheffield Farms Co., Inc.* v. *Seamen* (N. J.) 114 N. J. L. 455, 177 A. 372, cited in petitioner's statement, is not comparable. In this case, despite the fact that the plaintiff had a State of New Jersey license to sell milk anywhere in the state, and had complied with both city and state laws, it was arbitrarily refused a license by the Board of Health of the City of Perth Amboy, because the city had enough milk dealers. In both the cases of *State ex rel. Larson* v. *City of Minneapolis* (Minn.) 190 Minn. 138, 251 N. W. 121, and *LaFranchi* v. *City of Santa Rosa* (Cal.) 8 Cal. (2d) 331, 65 Pac. (2d) 1301, the city ordinances in question gave no consideration to the supply of milk available in the area, and provided for no inspection of farms supplying pasteurization plants. Section 8.09 (x) (6) of the Beloit ordinance provides for a periodical inspection of farms supplying milk to the pasteurization plants in the Beloit area (R. 27). Both of these ordinances arbitrarily and capriciously created trade barriers. The same observation is to be made of the cases of *Meridian* v. *Sippy* (Cal.) 54 Cal. App. (2d) 214, 128 P.

(2d) 884, and *Grant* v. *Leavell* (Ky.) 259 Ky. 267, 82 S. W. (2d) 283. In the case of *Prescott* v. *Borger* (Tex. Civ. App.) 158 S. W. (2d) 578, also cited in petitioner's statement, it was held that an ordinance prohibiting the sale of milk in a city, unless it had been pasteurized inside the city, was void because it transcended the general statutes of the state in regard to the regulation of the sale of milk.

It is respectfully submitted that the cases cited in petitioner's statement to show that Section 8.09 (x) (2) of the Beloit ordinance is in violation of Section 8 of Article I of the Constitution of the United States are not applicable to this case. The grant of power over interstate commerce in the Constitution, of its own force, establishes the immunity of interstate commerce from the control of the states with respect to those subjects embraced in the grant, which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. Such subjects are national in character, and require uniformity of regulation affecting alike all the states. In such matters, Congress can alone provide the needed regulations. *Southern Express Co.* v. *Byers*, 240 U. S. 612, 60 L. ed. 825, 36 S. Ct. 410; *Louisiana Pub. Serv. Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 76 L. Ed. 201, 52 S. Ct. 74.

In matters, however, admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their own jurisdictions until Congress sees fit to act, even though the enactments may have an incidental effect upon interstate commerce. *Pacific States Box & Basket Co.* v. *White*, — U. S. —, 80 L. Ed. (Adv. 133), 56 S. Ct. 159; *Hartford Accident & Indemnity Co.* v. *Illinois*, 298 U. S. 155, 80 L. Ed. 1099, 56 S. Ct. 685; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549.

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The Beloit ordinance does not prohibit the delivery of milk from pasteurization plants in Illinois. The city lies on the Wisconsin-Illinois state line. A large area in Illinois, including the villages of Rockton and Roscoe in that state, lies within the area defined by the ordinance. Two pasteurization plants located at Rockton and Roscoe deliver milk to the city for local consumption, in compliance with the ordinance. Farmers living both in Illinois and in Wisconsin deliver their milk to pasteurization plants supplying the city. No purpose to close the door to Illinois milk can be read into the ordinance.

It is neither the purpose nor the effect of the ordinance to prohibit or restrict interstate commerce, or to discriminate against the producers of milk in any state other than Wisconsin. We assume that the question would not be raised, except for the fact that the city of Beloit does adjoin the State of Illinois. The production of milk and its delivery are not acts of commerce, which from their nature admit only of national control. The flow of pure milk into a city is a local problem, with which Congress cannot deal effectively, and has not sought to deal. The City of Beloit, therefore, was free to act in the exercise of its police powers to protect its citizens, even though a part of the milk coming into the city does, in fact, come from another state. The ordinance is local in character and affects interstate commerce incidentally. There is no violation of the interstate commerce clause of the Federal Constitution. *State* v. *C. M. & St. P. R. Co.*, 136 Wis. 407, 117 N. W. 686; *Wadham's Oil Co.* v. *Tracy*, 141 Wis. 150, 123 N. W. 785.

We submit that the right of the City of Beloit to pass and enforce an ordinance restricting the sale of milk from pasteurization plants located within six miles of a point within the city is sustained by the cases above cited. (See,

also, *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549.)

It is respectfully submitted that no substantial question exists in this case, and that this Court should not take jurisdiction of this appeal under Section 237 (a) of the Judicial Code, as amended.

J. Arthur Moran,
*Delavan, Wisconsin,*
*Attorney for Appellees.*

Earl J. Caskey,
*of the firm of Arnold, Caskey & Robson,*
*Beloit, Wisconsin,*
*Of Counsel.*

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# SUPREME COURT OF THE UNITED STATES

**October Term, 1947, No. 275**

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LAWRENCE DYER,

*Appellant,*

*vs.*

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, AS CITY MANAGER OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; R. H. CALLAND, AS CITY CLERK OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; AND STANLEY J. GOLDSCHMIDT, CITY SANITARIAN OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN, *Appellees*

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## MOTION TO DISMISS OR AFFIRM

Now come the appellees, City Council of the City of Beloit, Rock County, Wisconsin; A. D. Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin; and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, and move that the appeal of the said Lawrence Dyer, appellant, be dismissed, or, in the alternative, that the judgment of the Supreme Court of the State of Wisconsin, in this case, be affirmed.

J. ARTHUR MORAN,
*Delavan, Wisconsin,*
*Attorney for Appellees.*

EARL J. CASKEY,
*of the firm of Arnold, Caskey & Robson,*
*Beloit, Wisconsin,*
*Of Counsel.*